University of Baltimore Law Forum

Volume 18
Number 1 *Fall, 1987*

Article 2

1987

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The Grand Jury — An Indictment

by The Honorable

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The origin of the Grand Jury has been lost in time,[1] but it is safe to say that it is of ancient vintage. Shakespeare's "Twelfth Night," Act III, Scene 2, observed that there "had been grand jurymen since before Noah was a sailor." While Shakespeare's comment is an exaggeration, it does serve to illustrate that Grand Juries have been part of our legal system for centuries.

It is reported in one source that King Ethelred of England in the Tenth Century had Grand Juries, or something similar to Grand Juries. Some historians claim that the ancestor of the present Grand Jury dates from 1166, the year of King Henry II's Assize of Clarendon.[2] The idea of the Grand Assize, as it was known to the Norman French from whence it originally came, was to employ a body of knowledgeable local gentry as the King's investigative arm. That body's function was to decide civil questions concerning conflicts of title and ownership of land.[3] As with most governmental institutions that survive to grow old, the duties change, and the Grand Jury is no exception.[4]

The Grand Assize was established by Henry II to enable him to wrest the administration of justice from the church and the feudal barons and place it under the sovereign. It was primarily a weapon for the King's use in enforcing the King's peace.[5]

Contrary to what many believe, the Grand Jury of 700 or 800 years ago failed not only to protect the King's subjects, but its action was closer to condemnation than mere indictment or accusation. Today, an indicted defendant is "presumed to be innocent until proven guilty." Not so in medieval times.[6] Then, an accusation by the Grand Assize was followed by trial in the form of an ordeal.[7] The ordeal took four specific forms — cold water, hot water, hot iron, and morsel.[8]

The cold water ordeal was of three days duration. The accused was submitted to it in the presence of a priest. The accused was taken to church where Mass was chanted and communion was offered to him. He was told not to partake of the communion if he was guilty of the crime charged. After communion the accused was stripped and cast into a body of water. If he sank, he was adjudged not guilty. If he swam, he was pronounced guilty. The theory being that his instinct for self-preservation would preclude his wilfully sinking.[9] That particular ordeal seems to have been a "no win situation." If the accused sank, he died from drowning; and if he swam, he died at the hands of the government. No matter how you look at it, he was just as dead.

Trial by hot water followed the same idea as trial by cold water, although it may have been more painful. Water was heated to a high temperature, and the hand or arm of the accused was plunged into the water up to the wrist or elbow. The severity of the crime dictated the extent to which the arm was immersed in the water. At the bottom of the water container was a stone that the accused was to bring forth when he withdrew his arm from the hot water. The arm was then bandaged for three days, after which the bandage was removed. If the scalding had healed, the accused was innocent; but if it had festered, he was guilty. (This particular ordeal may have given rise to the expression "in hot water," meaning to be in trouble, difficulty, or peril.)

Trial by hot iron was of a similar pattern. A piece of iron weight one to three pounds, according to the nature of the crime, was heated until it was red hot. The accused was then required to grab it with his naked hand and carry it nine feet and then drop it. His hand was bandaged for three days. If, at the expiration of that time, the wound had healed, he was not guilty. If it festered, he was guilty.

The ordeal by morsel was undergone by the accused's swallowing a piece of barley bread or cheese of the weight of one ounce. If he succeeded without serious difficulty, he was innocent; but if he choked, he was guilty.[10].

In 1215 trial by ordeal was abolished,[11] but the peril to an accused remained almost as certain. A defendant was tried by the very same jury that had indicted him.[12] Obviously, his propsects for acquittal were not bright. Slim as they were, they became even slimmer as a result of the practice of royal judges' fining and imprisoning jurors who found a defendant not guilty.

By the middle of the Fourteenth Century, English law reached the point where an accused could strike from a petit jury panel any person who had been a member of the Grand Jury that had indicted him.[13] It was also about that time that the Grand Jury began to hear testimony in private — a practice that gave rise to the current "secrecy" of Grand Jury proceedings.[14]

Today's popular, albeit misconceived, notion that a Grand Jury is a buffer between the government and the people — that it acts as a protector of a person from oppressive government — was a long time in developing. More than five hundred years elapsed from the origin of what we now call the Grand Jury to the ideal of that body's being a buffer or protector.

The Grand Jury's protectorate role seems to stem from a 1681 case involving Anthony, Earl of Shaftesbury, and Stephen Colledge.[15] Those two gentlemen were vocal Protestant opponents of King Charles II's attempt to reestablish the Roman Catholic Church in England. The Earl of Shaftesbury was also allegedly involved in a plot to assassinate the King. The King and his prosecutors sought to have Shaftesbury and Colledge indicted and tried for treason. The Grand Jury, exercising its power to interrogate witnesses in private outside the presence of the royal prosecutors, refused to indict.[16]

Shaftesbury's case is heralded as the cornerstone of the Grand Jury's role in protecting the innocent against malicious and oppressive government prosecution.[17]

Aside from the creation of the concept of an independent Grand Jury, another practice arose from the Shaftesbury case. That is for the prosecutor to present the same evidence to a subsequent Grand Jury and obtain indictments, notwithstanding the prior Grand Jury's refusal to charge, which is precisely what happened to Shaftesbury and Colledge. As a result of being indicted, Shaftesbury fled to Holland where he died two years later. Colledge was not so fortunate as to die a natural death. He was seized, tried, and executed as a traitor.[18] In this country today only one state applies a sort of "double jeopardy" to Grand Jury proceedings. In New York a failure by one Grand Jury to indict precludes indictment by subsequent Grand Juries.[19]

With the settlement by the British of the American colonies, the Grand Jury system was imported to North America from England. The then Grand Jury inspected and reported on conditions of public roads, the performance of public officials, and the expenditure of public funds.[20]

In colonial Annapolis a Grand Jury's protest against corruption and incompetence forced the city council to meet regularly and be more responsive to the public's needs.[21] A Boston Grand Jury's threat to indict public officials resulted in improvement in the maintenance of the city's streets.[22]

The prestige of the Grand Jury received a boost in 1743 as a result of a matter that is more familiar when thinking of "the freedom of the press." The case involved John Peter Zenger, a New York newspaper publisher who criticized the Royal Governor.[23] The governor sought to have Zenger prosecuted for criminal libel. The Grand Jury declined to indict, thus evidencing its independence. Unfortunately for Zenger, he was subsequently tried by way of a criminal information. Fortunately for him, he was acquitted.

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The Grand Jury was considered a highly esteemed body, regarded by the public as a protector of the innocent and as representing the ultimate in independence of spirit. Its influence was tremendous. Thomas Jefferson called it the "true tribunal of the people and the secret palladium of liberty."

Theoretically, the Grand Jury acts as a "sword and a shield" — a sword to indict when there is probable cause to believe that a crime has been committed, and the accused committed it;[24] a shield to protect citizens against oppressive or frivolous prosecution.[25] By the time the United States Constitution was adopted in 1787, the Grand Jury had become an established adjunct of the American judicial system.

Significantly, however, no right to indictment by a Grand Jury existed in the Constitution of the United States as originally drafted.[26] That right did not become constitutional until the ratification of the "Bill of Rights." The Fifth Amendment provides, in pertinent part: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."[27]

Notwithstanding that Constitutional fiat, the Supreme Court of the United States held in *Hurtado v. California*, 110 U.S. 516 (1884), that the requirement of indictment by a Grand Jury in a capital or infamous crime is not binding upon the states. There is nothing in United States constitutional law that requires a state to empanel Grand Juries.

Neither the Maryland Declaration of Rights nor the Maryland Constitution mandates a Grand Jury indictment as a prerequisite to any criminal proceeding. The establishment of the Grand Jury in this state is the result of statutory enactments by the legislature. Chief Judge Robert C. Murphy of the Court of Appeals of Maryland noted on January 31, 1973, in his Report to the Maryland General Assembly on the State of the Judiciary that "most states have abolished any such rigid requirements[s]" as indictment by a Grand Jury.

Currently, twenty-two states require a Grand Jury indictment in felony cases. Three require it only when a crime is punishable by death or life imprisonment. In the other twenty-five states, the prosecutor may elect to seek indictment or proceed by way of a criminal information.

Two states, Virginia and West Virginia, statutorily require indictment by a Grand Jury in all felony cases. In West Virginia an accused may waive an indictment if the felony is not punishable by life imprisonment, provided he has been advised of the nature of the charge and there is a written waiver signed by him and his counsel.

Now that we have seen from whence the Grand Jury stems, let us look at why it is "grand." Originally Henry II's Grand Assize consisted of twenty-four persons. It was, and still is, "grand" because of its size, not because of its function. The number of Grand Jurors has varied over the years. The federal government and some states require twenty-three Grand Jurors with a quorum consisting of sixteen members. Twelve votes are necessary to indict.

Interestingly, nowhere in the United States does the number of Grand Jurors exceed twenty-three. West Virginia requires sixteen Grand Jurors. In Virginia a Grand Jury may be composed of as few as five people. Indiana and South Dakota have six; Oregon, Iowa, Montana, and Utah have seven. In the states which have more than twelve Grand Jurors, at least twelve must vote to indict. One state — Tennessee — has a unique approach. There a Grand Jury consists of twelve citizens, and unanimous consent is necessary before an indictment is returned. Kansas, Michigan, Wisconsin, and Washington permit one person Grand Juries.

With that background in mind, let us now consider the role of the Grand Jury in today's society. What does it do, and how does it to it?

Far from being a "buffer" between the government and the people, the Grand Jury is an investigatory and accusatory body.[28] It rarely hears from any witnesses, except those subpeoned before it for the purpose of demonstrating to the jurors that the State has reason to ask for an indictment against someone for an alleged criminal violation. Whether the state's reason always amounts to "probable cause" is open to considerable debate.

The Grand Jury has been both praised and damned. There are those who still view it as being clad in its ancient role of "buffer" between the citizen and the State, a safeguard of liberty. Others, not so charitable, see the Grand Jury as nothing more than an instrumentality of the prosecution. They believe that the Grand Jury has abandoned its historical role and become the "rubber stamp" of the prosecutor. Some critics label the Grand Jury as barbaric, mischievous, abusive, and insulting.[29] They perceive it as nothing more than another tool of the prosecution.

To illustrate that the Grand Jury is at the opposite end of the spectrum from that of an impartial fact finder, one need only look to case histories involving legal attacks on Grand Jury composition. Membership on the Grand Jury of the following persons has been held not to taint that august body's deliberations:

1) the prosecutor in the case, *United States v. Williams*, 28 F. Cas. 666 (CCD. Min. 1871);

2) a relative of the victim, *Collins v. State*, 3 Ala. 64 (1912);

3) The complaining witness, *Holmes v. State*, 160 Ark. 218 (1923); *U.S. v. Belvin*, 46 F. 381 (1891); *U.S. v. Williams*, 28 F. Cas. 666 (1871); *In re Tucker*, 8 Mass. 286 (1811);

4) the son-in-law of the murder victim, *Oglesby v. State*, 83 Fla. 123 (1922);

5) a rape victim's father, *Zell v. State*, 15 Ohio App. 446 (1922);

6) the committing magistrate, *State v. Chairs*, 9 Baxt. (Tenn.) 196 (1877); *U.S. v. Palmer*, 27. F. Cas. 410 (1810).

7) a member of a jury before whom the accused was alleged to have committed perjury, *State v. Wilcox*, 104 N.C. 847 (1889);

8) a special police officer, *Commonwealth v. Hayden*, 163 Mass. 453 (1895);

9) a member of an organization the object of which was to detect crime, *Musick v. The People*, 40 Ill., 268 (1866); *Com. v. Craig*, 19 Pa. Super. Ct. 81 (1902).

10) the person who issued the warrant for and expressed an opinion as to the guilt of the accused, *United States v. Belvin*, 46 F. 381 (1891);

11) a deputy sheriff, *Owens v. The State*, 25 Tex. App. 552 (1888);

12) a policeman, *Hopkins v. State*, 23 Md. App. 53 (1974);

13) depositors in an insolvent bank when the bank president was accused of causing the insolvency, *Coblentz v. State*, 164 Md. 558 (1933).

Contrary to popular view, a Grand Jury, unlike the petit jury, is not a judicial tribunal. The rules of evidence do not apply. *It acts upon any knowledge possessed by any of its members from any source.*[30] By their oath, Grand Jurors are sworn to bring indictments or to refuse to do so as a result of the knowledge they have acquired through their inquiry. That inquiry more often than not is limited to what is presented to them by the prosecutor. Patently, a prosecutor does not ordinarily present evidence which would lead to dismissal of the matter. What is presented is carefully designed to achieve the prosecutorial result — indictment.

The investigations and deliberations of the Grand Jury are supposed to be cloaked in secrecy and free from interference or influence. "Leaks," however, are not uncommon and sometimes may be planted or managed. In order to protect the innocent, a Grand Jury's inquiry into a person's activities, which inquiry does not result in an indictment, should not be made public.[31] Such a person must be protected from disrepute and character assassination by a Grand Jury's or a prosecutor's utilizing the Grand Jury as a tool. That is a reason why members of the Grand Jury are not free to allege that a named but unindicted person or one who is unnamed, but nevertheless identifiable by position, title, or description, has acted improperly or illegally. Nothwithstanding the curb on Grand Jury reports, an Anne Arundel County Grand Jury appealed an order to have its report become public. They lost. The appeal was dismissed. Nevertheless, the court proceeding was mooted by the report's being "leaked" to the press by person or persons unknown. So much for secrecy in that case![32]

"The prosecutor should be charged directly with the responsibility of initiating criminal proceedings."

Today, any prosecutor worthy of the name will acknowledge that he or she can have any one indicted.[33] If a particular Grand Jury balks at indictment, the prosecutor, following the 1681 *Shaftesbury* precedent, need but turn to the next Grand Jury or the next to obtain the indictment.[34] Of one thing you may be certain, if the prosecutor so desires, an indictment will follow just as surely as night follows day.[35] This practice by prosecutors gives credence to the charge of "rubber stamp." In any event, the idea that a Grand Jury acts as a buffer between the government and the people, unfortunately, is no more than a fiction. It is a tale that we like to believe because it makes us feel safe and secure, but then again so does a belief in a fairy godmother, and the two are equally protective.

As we have discussed, there is no need for a Grand Jury in state criminal proceedings.[36] The State's Attorney is an elected public official, a constitutional officer, fully clothed with all of the authority necessary to initiate proceedings against anyone the prosecutor believes has committed a criminal act. The prosecutor should be charged directly with the responsibility of initiating criminal proceedings. The prosecutor, not a Grand Jury, is answerable to the electorate for charges improperly, maliciously, or abusively instituted.[36] That, it is submitted, is the way it should be. Let the prosecutor be accountable for his or her acts. It is time for prosecutors to stop using the Grand Jury as a "front" for the prosecutor's act; it is time for the prosecutor to stand on his or her own legs and not those of twenty-three other persons'. It is time for prosecutors to come out of the Grand Jury room and publicly acknowledge that he or she, not the Grand Jury, is the movant behind a criminal charge.

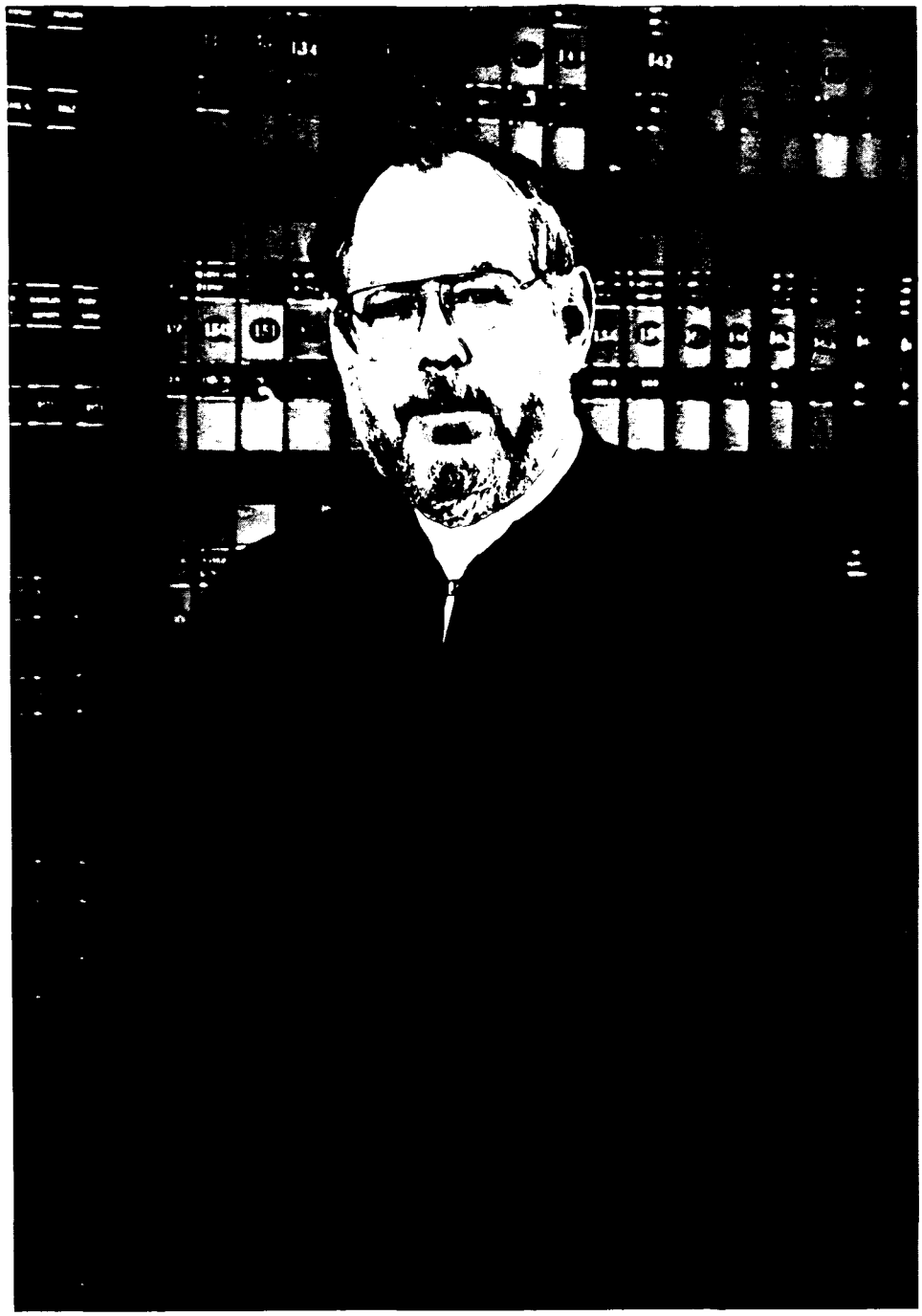
We emulated England in adopting the Grand Jury system. Let's continue to follow in their footsteps and do what England did more than fifty years ago — abolish it.

Notes

[1] Olson, *Preface* to Edward, *The Grand Jury*, at 1 (1973).
[2] Younger, *The People's Panel: The Grand Jury in the United States 1634-1941*, at 1 (1963).
[3] *Id.* at 12.
[4] Frankel and Naftalis, *The Grand Jury*, at 3 (1975).
[5] Olson, *Preface* to Edwards, *The Grand Jury*, at 8 (1973).
[6] Frankel and Naftalis, *The Grand Jury*, at 7 (1975).
[7] Olson, *Preface* to Edwards, *The Grand Jury*, at 4 (1973).
[8] Frankel and Naftalis, *the Grand Jury*, at 7 (1975).
[9] *Id.* at 7, 8.
[10] *Id.*
[11] *Id.* at 8.
[12] Olson, *Preface* to Edwards, *The Grand Jury*, at 18-22 (1973).
[13] *Id.* at 24.
[14] Olson, *Preface* to Edwards, *The Grand Jury*, at 28 (1973); Frankel and Naftalis, *The Grand Jury*, at 9 (1975).
[15] Olson, *Preface* to Edwards, *The Grand Jury*, at 29, 30, 129.
[16] Frankel and Naftalis, *The Grand Jury*, at 9 (1975).
[17] *Id.*
[18] *Id.*
[19] NY Code 55 C.P.L. § 190.75. That section provides:

> When a charge has been so dismissed [by a Grand Jury] it may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the people to resubmit such charge to the same or another grand jury. If in such case the charge is again dismissed [by the Grand Jury] it may not again be submitted to a [subsequent] grand jury."

[20] Frankel and Naftalis, *The Grand Jury* at 9 (1975).
[21] *Id.* at 11.
[22] *Id.* at 10, 11.
[23] Beale & Bryson, *Grand Jury Law and Practice § 1:01 to § 6:41*, at 14 (1986); Olson, *Preface* to Edwards, *The Grand Jury*, at 32 (1973); Frankel and Naftalis, *The Grand Jury*, at 11 (1975).
[24] Olson, *Preface* to Edwards, *The Grand Jury*, at 141 (1973).
[25] Frankel and Naftalis, *The Grand Jury*, at 3 (1975).
[26] Beale & Bryson, *The Grand Jury Law & Practice § 1:01 to § 6:41*, at 18, 19, (1986).
[27] Frankel and Naftalis, *The Grand Jury*, at 32, 33 (1975).
[28] *Id.* at 35.
[29] Olson, *Preface*, to Edwards, *The Grand Jury*, at 1 (1973).



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